No. 796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 22

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RICHARD C. PRICE AS AMICUS CURIAE

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This brief on behalf of Richard C. Price, as *amicus curiae*, is filed pursuant to the written consent of the parties under Rule 42(2) of the Rules of this Court.

INTEREST OF AMICUS CURIAE

Richard C. Price was formerly an employee of Pittsburgh-Des Moines Steel Company, working at the latter's plant in Santa Clara, California. He was also a dues-paying member of United Steelworkers of

America, AFL-CIO, Local Union No. 4028, the union that represented employees at the Santa Clara plant.

On June 3, 1964, Price filed with the Regional Director of the Twentieth Region of the National Labor Relations Board a petition in which he sought the decertification of the Steelworkers as the bargaining representative of the Santa Clara plant employees. For filing the decertification petition, the Steelworkers, among other things, suspended Price from membership, and levied against him a fine of $500 which was subsequently withdrawn. Thereafter, upon unfair labor practice charges filed by Price against the Steelworkers, the Board held that the Steelworkers' disciplinary action against Price because he had invoked the Board's decertification procedures was not an unfair labor practice within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act. *United Steelworkers of America*, 154 NLRB 692. The Board's decision was subsequently affirmed by the Court of Appeals for the Ninth Circuit. *Price* v. *National Labor Relations Board*, 373 F.2d 443.

In July 1967, Price petitioned this Court for a writ of *certiorari* to review the Ninth Circuit's judgment. *Richard C. Price, Petitioner*, v. *National Labor Relations Board and United Steelworkers of America, AFL-CIO, Local Union No. 4028*, No. 399, October Term, 1967. Price's petition was not opposed by either the Board or the Steelworkers. See memoranda filed in No. 399. A ruling on Price's petition has not yet issued, however, and No. 399 is presently pending before the Court.

Price has a substantial interest in the outcome of this case. As the Board recognized in the memorandum it filed in No. 399, the issue in this case is

interrelated with the issue in Price's case. Each case presents the basic issue of whether a union violates Section 8(b)(1)(A) of the Act by taking disciplinary action against a union member for invoking the Board's processes. Although the two cases are factually distinguishable—this case involving the filing of an unfair labor practice charge with the Board, Price's case involving the filing of a decertification petition—the distinction is not meaningful. Thus, if the Court upholds the Board's position in this case, reversal of the Board's position in Price's case may reasonably be anticipated; if, on the other hand, the Court rejects the Board's position in this case, the result in Price's case would almost certainly be sustained.

ARGUMENT

1. The premises upon which the Board's decision in this case rests were set forth initially in the Board's earlier decision in *Local 138, International Union of Operating Engineers (Charles S. Skura)*, 148 NLRB 679. Succinctly stated, these premises are as follows: As the Board may proceed against unfair labor practices only in response to unfair labor practice charges filed with it, the freedom of individuals to file Board charges is crucial in the protection of rights protected by Section 7 of the Act and that freedom therefore is a right protected by Section 7; by expelling or fining a member for filing unfair labor practice charges a union "restrains" or "coerces" the member, within the meaning of Section 8(b)(1)(A), in the exercise of rights guaranteed by Section 7; the proviso to Section 8(b)(1)(A), which recognizes "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership,"

does not authorize a union to prevent or regulate access to the Board; and therefore, in view of the overriding public interest involved, a union rule which seeks to prevent or limit access to the Board's processes is beyond the lawful competency of a labor organization to enforce by coercive means.

The rationale of the *Skura* case was expressly approved by the Court of Appeals for the District of Columbia Circuit in *Roberts* v. *N.L.R.B.*, 350 F.2d 427. The court, in *Roberts*, said (350 F.2d at 429):

> In other words, by filing a charge with the Board [the union member] stepped beyond the internal affairs of the Union and into the public domain. The Act, in enabling the Board to inhibit the Union from penalizing him for doing so keeps open the channels created by Congress for the administration of a public law and policy. This is not, we agree with the Board, an inroad upon those internal union affairs left by the Act and its policy to be administered solely by the Union.

The Court of Appeals for the Third Circuit has likewise given its sanction to much of the Board's *Skura* doctrine. See *Philadelphia Moving Picture Machine Operators' Union, Local No. 307, I.A.T.S.E.* v. *N.L.R.B.*, 382 F.2d 598. The Board's reasoning in *Skura*, we submit, is sound and should be upheld by this Court. See also *Nash* v. *Florida Industrial Commission*, 389 U.S. 235.

2. Although in *Skura* the Board properly recognized that Section 8(b)(1)(A) protects an employees' Section 7 right to file unfair labor practice charges, and that a union may not prevent or regulate access to the Board's processes, the Board has nevertheless refused to apply the *Skura* principle where a union

disciplines a member because the member filed with the Board a petition under Section 9(c)(1)(A)(ii) of the Act seeking the union's decertification as a bargaining representative. *United Steelworkers of America*, 154 NLRB 692; *Tawas Tube Products, Inc.*, 151 NLRB 46. See also *Cannery Workers Union of the Pacific*, 159 NLRB 843. The full implication of the Board's *Skura* doctrine is shown, therefore, by an examination of the Board's illogical and inconsistent action with respect to decertification petitions.

In *United Steelworkers*, the Board explained that it would not apply the *Skura* doctrine in the decertification petition context because there is a "fundamental distinction between union disciplinary action aimed at the filing of charges seeking redress for asserted infringement of statutory rights, as in *Skura*, and union disciplinary action aimed at defending itself from conduct which seeks to undermine its very existence" (154 NLRB at 696). In *Cannery Workers*, the Board acknowledged that Section 9 proceedings ". . . are no less within the public domain," but amplified its view that a union had immunity to discipline a member who files a decertification petition: "In the fluid rather than fixed circumstances of a contest for support, the union and its adherents can perform their legitimate function effectively only if they are unified. To require them to tolerate an active opponent within their ranks would undermine their collective action and thereby tend to distort the results of the election. To permit the union and its members to discipline the hostile members is therefore not inconsistent with the purposes of the Act and *impinges on no legitimate interests of others* . . . ." [Emphasis added.] (159 NLRB at 850.)

Plainly, the Board's position with respect to decertification petitions misinterprets the statutory language,

misconceives the express intent of Congress, and subverts the policy of the Act. Section 7 of the Act gives to employees the right to join or assist labor organizations, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; it likewise gives them the "right to *refrain from any or all of such activities.*" The "right to refrain" becomes illusory, we submit, if employees, having once designated a bargaining representative, are thereafter precluded from withdrawing the authority they have bestowed. The procedure set forth in Section 9(c)(1)(A)(ii) of the Act not only is a tool in effectuating the employee "right to refrain," but, as shown below, it also denotes an additional employee statutory right—the right to petition for union decertification.

The filing of a decertification petition sets in motion the Board's election procedures. In the words of Senator Taft, the purpose of a decertification petition, as provided for in Section 9(c)(1)(A)(ii) of the Act, is to afford employees an opportunity "to decertify a particular union" or "to decertify a union and go back to a nonunion status, if the men so desire." 93 *Daily Congressional Record* 1013, April 23, 1947, 2 *Legislative History of the Labor Management Relations Act of 1947*, p. 1013 (hereinafter cited as "*Leg. Hist.*"). Moreover, it is clear that Congress intended to grant employees preferring such "nonunion status" a *right* to petition the Board for the union's decertification. Thus, the pertinent House Report, H. Rep. No. 245, 80th Cong., 1st Sess. 35, 1 *Leg. Hist.* 326, stated with respect to Section 9(c)(1)(A)(ii):

> Although the terms of the Act would permit them to do so, the Board has denied to em-

> ployees who have designated an exclusive representative the *right* to have it decertified unless, at the same time, they subject themselves to control by another representative. The bill restores to employees this *right* of which the Board deprived them . . . . [Emphasis added.]

See also S. Rep. No. 105, 80th Cong., 1st Sess. 10, 25, 1 *Leg. Hist.* 416, 431; H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 50, 1 *Leg. Hist.* 554. Statements by legislators show their understanding that the *right* to petition for decertification was given to "discontented" or "dissident" employees. 1 *Leg. Hist.* 653 (Congressman Klein); 1 *Leg. Hist.* 693-694 (Congressman Powell); 2 *Leg. Hist.* 1581 (Senator Murray).[1]

It is thus evident that there is just as much reason for engrafting on Section 7 a right to file a decertification petition as there is to engraft thereon, as the Board has done, a right to file charges. It is also clear that whether a charge or a petition be involved, there exists a paramount public interest in protecting the administrative processes of the Board from attack and undermining. In either case, the result must be dictated by what the Board said in *Skura* (148 NLRB at 682), "considering the overriding public interest involved . . . no private organization should be permitted to prevent or regulate access to the Board," and what the District of Columbia Circuit had in

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[1] The Congressional intent underlying Section 9(c)(1)(A)(ii) of the Act has been effectuated by Board rulings. See *Kraft Foods Company*, 76 NLRB 492, 495 (withdrawal from union membership held not prerequisite to filing a decertification petition); *Federal Shipbuilding & Drydock Company*, 76 NLRB 413 (employee's reason for filing decertification petition held immaterial); *Morse & Morse, Inc.*, 83 NLRB 383, 384 (union officer held competent to file decertification petition).

mind when it admonished in *Roberts* (350 F.2d at 429) that the "channels created by Congress for the administration of a public law and policy" cannot be allowed to be obstructed by union policy or action.

Nor is the Board's "preservation of the union's existence" rationale persuasive. At least in the case of large unions, the union's decertification at one plant does not necessarily jeopardize its overall existence. But even were it true that decertification would normally be tantamount to extinction, such a consideration cannot be deemed controlling. The Act is primarily concerned with employee rights and their protection; what rights labor organizations may have under the Act are subordinate to employee rights. Certainly, in the face of the explicit Section 7 employee right to refrain from collective activities, in the face of the explicit Section 9(c)(1)(A)(ii) employee right to decertify, the dubious interest of a union in perpetuating its life—nowhere stated to be a "right" under the Act—ought not to prevail.[2]

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[2] The Board's "preservation of the union's existence" reasoning would also sanction a union's disciplining a member for filing, or supporting, a typical Section 9(c)(1)(A)(i) *representation* petition. Such a petition to certify a rival union could prove just as effective as a decertification petition in undermining an incumbent union's "existence." Indeed, the Board appears to have acknowledged that it would permit an incumbent union to discipline a member for filing *any* petition. See *Cannery Workers, supra,* 159 NLRB at 849-850, where the Board broadly distinguishes cases arising under Section 8 of the Act from cases arising under Section 9.

On the other hand, should the Board attempt to distinguish between union discipline for filing, or supporting, a decertification petition and similar coercion for filing, or supporting, a certification petition, it would be inescapable that the right of employees to *change* bargaining agents would be regarded by the Board as superior to their right to *reject* such an agent.

CONCLUSION

It is respectfully submitted that the *Skura* doctrine, despite its illogical and inconsistent application by the Board, should be upheld, and that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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Dated: March 1968.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

* * * *

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in in exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

* * * *

REPRESENTATIVES AND ELECTIONS

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit ap-

propriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

* * * *

Sec. 9 (c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) . . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

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